

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
1998 Biennial Regulatory Review –)	CC Docket No. 98-171
Streamlined Contributor Reporting)	
Requirements Associated with Administration)	
of Telecommunications Relay Service, North)	
American Numbering Plan, Local Number)	
Portability, and Universal Service Support)	
Mechanisms)	
)	
Telecommunications Services for Individuals)	CC Docket No. 90-571
with Hearing and Speech Disabilities, and the)	
Americans with Disabilities Act of 1990)	
)	
Administration of the North American)	CC Docket No. 92-237
Numbering Plan and North American)	NSD File No. L-00-72
Numbering Plan Cost Recovery Contribution)	
Factor and Fund Size)	
)	
Number Resource Optimization)	CC Docket No. 99-200
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170

**REPLY COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION**

The Cellular Telecommunications & Internet Association ("CTIA")¹ hereby submits its Reply Comments in response to the above captioned proceeding.²

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

I. INTRODUCTION AND SUMMARY

In the Further Notice, the Commission sought comment on a proposal that would radically change the universal service contribution mechanism by assessing contributions based on the number and capacity of connections provided by a carrier instead of on a per revenue basis. Under this proposal, residential, single-line business, and mobile wireless connections (excluding pagers) would be assessed a flat amount of \$1.00 per connection per month. Paging connections would be assessed \$0.25 per connection, and the remaining universal service funding needs would be recovered through capacity-based assessments on multi-line business connections. As explained below, CTIA believes that this proposal is unlawful, unfair, and unnecessary. CTIA urges the Commission to reject the connections-based funding proposal and maintain the current system, including the “safe harbor” for CMRS carriers.

II. THE PROPOSAL IS UNLAWFUL

The Commission is bound by the statutory mandate set forth in Section 254(d) of the Communications Act, as amended. The connection-based universal service funding proposal must be rejected because it would exclude interexchange carriers (“IXCs”) with billions of dollars of interstate telecommunications activities from the obligation to fund universal service. This would violate the plain meaning of Section 254(d) which requires that:

Every carrier that provides interstate telecommunications service shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable; and sufficient mechanism established by the Commission to

² Federal-State Joint Board on Universal Service, et. al., Further Notice of Proposed Rulemaking, CC Docket Nos. 96-45, 98-171, 90-571, 92-237 and NSD File No. L-00-72, and CC Docket Nos. 99-200, 95-116, and 98-170, FCC 02-43 (rel. Feb. 26, 2002) (“Further Notice”).

preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's *telecommunications activities* are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.³

Section 254(d) imposes a universal service funding requirement on *all carriers*, and the sole exception to this mandate applies only to carriers whose *interstate telecommunications activities* are so limited that the carrier's contribution to the universal service fund would be de minimis. The connection-based universal service funding proposal must be rejected because the exclusion of billions of dollars of interstate revenue generated by the telecommunications activities of interexchange carriers cannot be made to pass through the eye of the "de minimis" needle.

The connection-based universal service funding proposal also fails the legal requirements established by the U.S. Court of Appeals for the Fifth Circuit. In *Texas Office of Public Utilities Counsel v. FCC*, the Court ruled that Section 2(b) of the Communications Act, read in conjunction with Section 254(d), prohibits the Commission from adopting a contribution mechanism that includes intrastate revenues in the calculation of universal service contributions.⁴ As the Fifth Circuit noted, Section 2(b)

³ Section 254(d) Communications Act, as amended, (emphasis added). 47 U.S.C. §254(d).

⁴ *Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999). While the limitation on the FCC's jurisdiction set forth in Section 2(b) of the Communications Act does not apply "as provided in section 332," 47 U.S.C. § 152(b), over CTIA's objections, the Courts have held that Section 332 does not prevent the states or the Commission from imposing universal service funding obligations on CMRS carriers. *Id.*, 183 F.3d at 430-433; *Cellular Telecommunications Industry Association v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999); *Sprint Spectrum, L.P. v. State Corporation Commission of the State of Kansas*, 149 F.3d 1058 (10th Cir. 1998).

“directs courts to consider FCC jurisdiction over a very broad swathe of intrastate services.”⁵ The Fifth Circuit stated that Section 2(b) denies the FCC “jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service...”⁶ In perfectly clear terms, the Court explained that “the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a charge ... in connection with intrastate communication service.”⁷

A connection-based assessment is just as much of a “charge” as the revenue-based charge addressed by the Fifth Circuit. To the extent the services provided over the connections are intrastate, the charge is “in connection with intrastate communication service” and thus is subject to the jurisdictional restriction of Section 2(b). The proposal set forth in the Further Notice would assess contributions on “any entity that provides an end user with a connection to a public network”⁸ without regard to whether the services provided are interstate or intrastate. This would require the Commission to assume “jurisdiction over intrastate matters stemming from the agency’s plenary powers.”⁹ In so doing, the Commission would again overstep its jurisdiction and violate Section 2(b).

⁵ *Id.*, 183 F.3d at 447.

⁶ *Id.*

⁷ *Id.*

⁸ Further Notice at ¶ 71.

⁹ *Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d at 448.

The connections-based funding approach also violates the requirement in Section 254(d) that every carrier “shall contribute, on an equitable and non-discriminatory basis.” At the present time, contributions from interexchange carriers constitute 63% of the federal universal service fund assessments, reflecting the fact that the interexchange carriers are, by far, the largest providers of interstate telecommunications services.¹⁰ Excluding these carriers’ provision of interexchange services from the contribution base is neither equitable nor is it non-discriminatory.

But even if Sections 2(b) and 254(d) did not present a complete bar to the connection-based funding proposal, the proposal would still have to be rejected as bad public policy.

III. THE PROPOSAL IS UNFAIR

As noted by the overwhelming consensus of commenters, a connection-based flat-fee is like the Robin Hood story turned inside out -- a regressive tax that places a disproportional funding burden on low-volume users (often low income individuals and small businesses) in order to subsidize the largest (and often richest) consumers of telecommunications services. CTIA agrees with consumer advocates, state commissions, and mobile service providers that the proposal is neither equitable nor nondiscriminatory.¹¹ As demonstrated by the studies referenced in the Consumers Union

¹⁰ Further Notice at ¶39.

¹¹ See National Association of State Utility Consumer Advocates Comments at 2 (“a connection-based mechanism inequitably places the same burden of contribution on those who do not use the interstate network as on those who are heavy users of the network.”); California Public Utilities Commission Comments at 2, 5 (stating that the connection-based proposal is “unfair and inequitable because, among other things, low-usage households would be assessed a disproportionate amount”).

Comments, “both average-use and low-use residential customers utilizing any of the 13 calling plans of carriers studied would pay more per month under the Commission’s proposed connection-based fee system than they do under the current revenue-based system.”¹² And “for customers using small, low-rate long-distance providers, the impact would be far greater.”¹³

The proposal is particularly problematic to prepaid wireless customers and to the millions of customers who subscribe to the “peace of mind” tier of wireless service offerings primarily for occasional or emergency use.¹⁴ CTIA agrees with Virgin Mobile that given the demographics of the prepaid industry consumers “cannot easily absorb the drastic price increases that an impermissibly high, discriminatory contribution-based system may cause, and may decrease their usage of the products accordingly.”¹⁵ The universal service fund, a system designed to advance the ubiquitous provision of telecommunications services, should not discourage consumers from purchasing these essential services.

IV. THE PROPOSAL IS UNNECESSARY

Not only is the connection-based funding proposal unlawful and unfair, it is also unnecessary. As many of the comments observed, the predicate for making such a dramatic change in the current universal service funding mechanism is lacking. Contrary

¹² Comments filed by Consumer Union, et al. at 11.

¹³ Comments filed by Consumer Union, et al. at 11-12.

¹⁴ See Onstar Comments at 5 (stating that a connection-based proposal “has the potential to create serious inequities for customers of prepaid services like OPC (OnStar Personal Calling) compared to postpaid services”).

¹⁵ Virgin Mobile Comments at 15-16.

to the implicit assumption in the Further Notice that changes in the interstate telecommunications market mandate a fundamental change in the universal service funding mechanism,¹⁶ the overall size of the interstate telecommunications market has been remarkably stable. Indeed, interstate end-user telecommunications revenues increased 6 percent in the past three years – from \$74 billion in 1998 to \$79.4 billion in 2001.¹⁷

To the extent there is a funding “crisis” it has been triggered by the Commission’s expansion of the *demand* for universal service funding, not by a reduction in the *supply* of support funds generated by the current system. During the past three years, while revenues remained stable, the federal Universal Service Fund disbursements soared from \$3.6 billion in 1998 to \$5.5 billion in 2001.¹⁸ Unfortunately, changing the contribution mechanism will do nothing to address this fundamental imbalance. Indeed, rather than proposing to exclude the single largest source of interstate telecommunications revenues from the obligation to fund its universal service programs, the Commission should be seeking to expand the base of contributors.¹⁹

¹⁶ See Further Notice at ¶¶ 1 and 7.

¹⁷ See *Universal Service Monitoring Report*, Table 1.1. (Dec. 1999), and the Commission’s Quarterly Contributions Factor *Public Notices*.

¹⁸ *Id.*, Table 3.7 (Oct. 2001).

¹⁹ CTIA is aware that the Commission is now considering precisely such action. See, e.g., *In the Matter of Appropriate Framework for Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provisions of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 02-23, 95-20,98-10, *Notice of Proposed Rulemaking*, FCC 02-42, (rel. Feb. 15, 2002); and *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Appropriate Treatment for Broadband Access to the Internet*

It also is clear from the comments that the proposed connections-based funding system will create a new set of additional administrative burdens and uncertainties. Rather than simplifying the current contribution mechanism, the proposed connections-based funding system will impose a monthly reporting obligation on all carriers and require the creation of an entirely new system of complex allocations to implement the capacity-based charges to be recovered from multi-line business connections. Indeed, as NECA warns, this portion of the proposal raises “difficult administrative issues that may far exceed the problems the Commission has identified with a revenue-based assessment mechanism.”²⁰

The difficulty stems from the proposal to base the residual multi-line business assessment on the maximum capacity of the connections, and using bandwidth instead of lines to avoid the need to establish voice-grade equivalency ratios for these connections.²¹ However, rapidly evolving wireline and wireless broadband technologies promise to make high bandwidth applications available to all subscribers. CTIA agrees with NECA that the complexities of dealing with capacity-based or bandwidth-based assessment mechanisms (especially in light of section 254(d)’s command that the contribution mechanism be “equitable and non-discriminatory” as technologies and services rapidly evolve) may far exceed the problems the Commission has identified with the current revenue-based assessment mechanism.²²

Over Cable Facilities, GN Docket No.00-185; GS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rule Making*, (rel. March 15, 2002).

²⁰ See Comments of the National Exchange Carrier Association, Inc.

²¹ Further Notice at ¶ 35 and ¶ 44.

²² See Comments of the National Exchange Carrier Association, Inc.

V. CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission reject the proposal to change the universal service contribution mechanism by assessing contributions based on the number and capacity of connections provided by a carrier. CTIA believes that this proposal is unlawful, unfair, and unnecessary. CTIA urges the Commission to reject the connections-based funding proposal and maintain the current system, including the “safe harbor” for CMRS carriers.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
& INTERNET ASSOCIATION**

/s/ Michael Altschul

Michael F. Altschul
Senior Vice President, General Counsel

**CELLULAR TELECOMMUNICATIONS
& INTERNET ASSOCIATION**

1250 Connecticut Avenue, N.W.

Suite 800

Washington, D.C. 20036

(202) 785-0081

Its Attorney

May 14, 2002